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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 16
1963

BANCO NACIONAL DE CUBA,

Petitioner,

v.

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, Co-Partners, doing business as FARR, WHITLOCK & CO.

REPLY OF RESPONDENT FARR, WHITLOCK & CO. TO MEMORANDUM FOR THE UNITED STATES

We have been advised by the Clerk of the Court that we may comment on the Solicitor-General's memorandum.

1. The Solicitor-General does not suggest that the Court of Appeals erred on the merits. The Court of Appeals and the District Court were correct in holding that the Cuban confiscatory decree violated international law and that the title of Banco Nacional de Cuba is invalid, petitioner submits. We submit, also, that those decisions were correct wholly apart from any consideration of the Act of State Doctrine.

Banco Nacional is not a private citizen who may have acted in good faith reliance upon the Cuban decree, but is the financial agent of the Cuban Government. It stands in the shoes of the Cuban Government seeking to enforce a confiscatory decree, in a commercial transaction, in the courts of this country. *Banco Nacional de Cuba* v. *Sabbatino*, 193 F. Supp. 375, 381 (J. A. 164a).

Cuba has "freely come as a suitor [before] our courts" by its own choice in attempted furtherance of its own "commercial operations." Cuba "wants our law," but "it wants our law free from the claims of justice." See *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, 361-362, 364; 26 Dept. State Bull. 984.

Neither the sugar shipment nor its proceeds were in Cuba or in the possession of Cuba when the Cuban Government sought the aid of our courts. They were outside Cuba. Our courts are now asked to enforce this arbitrary and discriminatory confiscation and reclaim these proceeds for the benefit of Cuba.

Under the particular facts of this case, there is no requirement or justification either under the Act of State Doctrine or under any principle of law or justice that the United States enforce the Cuban confiscatory decree in its courts. As this Court pointed out in *National City Bank of New York* v. *Republic of China*, *supra*, the present climate of opinion reflects a "growing subjection of governmental action to the moral judgment," 348 U. S. 359.

2. The Solicitor General maintains that the Court of Appeals erred in regarding the communications from the State Department to counsel for the *amici* in this case and to the parties in *Kune* v. *National Institute* quoted at 307 F. 2d 858 (page 48 of the petition for certiorari) as a "Bernstein letter."

Respondent urges that the Solicitor General's position is incorrect.

In both *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij*, 210 F. 2d 375 (C. A. 2d), and the present case, the Court had before it (1), official statements by the Department of State condemning the seizures in question, and (2), communications from one or more officers of the State Department indicating acquiescence in the exercise by the courts of their jurisdiction with respect thereto.

To say that there is a difference between the statement indicating acquiescence in *Bernstein* and those in this case is, we submit, in the nature of quibbling.

In *Bernstein*, 210 F. 2d 376, the Acting Legal Adviser said that the Department "relieve[d] American courts from any restraint upon the exercise of their jurisdiction." In the present case the Legal Adviser said: "Whether or not these nationalisations will in the future be given effect in the United States is, of course, for the courts to determine." And in *Kane* the Department said that the effect in the United States of the Castro decrees "is question for court in which case heard." 307 F. 2d 858; page 48 of petition.

There is no suggestion that these statements did not at the time and do not now represent the policy of the Department of State.

And that the Department of State condemns the confiscations of issue here as severely as those in *Bernstein*, 210 F. 2d 376, is shown by the present record.

Thus the State Department asserted in a note to the Cuban Ministry of Foreign Relations respecting the nationalization law on which the confiscatory decree herein involved was based (J. A. 63a):

> "* * * the Government of the United States considers this law to be manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory." 43 Department of State Bull. 171.

Again in a note protesting the Cuban seizure of American oil refineries the State Department declared:

> "* * * my Government regards the actions taken against them [US oil refineries] as a violation of accepted standards of ethics and morality in the free world * * *." 43 Department of State Bull. 141, 142.

As the District Court in this case stated at page 381 (J. A. 164a):

> "It can scarcely be believed therefore that judicial examination of the decree in the light of international law would embarrass the executive."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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January, 1963.